To commence the statutory time period for Appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
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FOX VARIAN,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 61150/2023
Motion Seq. Nos. 1 & 2

KENNETH EINHORN, PhD, CARMEL PSYCHOLOGICAL ASSOCIATES, P.C., SIMON H. CHIN, M.D. and CAREMOUNT MEDICAL, P.C.,

Defendants.
----------x
QUINN KOBA, J.

By Notice of Motion (motion sequence no. 1), defendants, Simon H. Chin, M.D. ("Chin") and CareMount Medical, P.C. ("CareMount"), seek an Order, pursuant to CPLR § 3212, granting summary judgment in their favor dismissing plaintiff's complaint ("Chin Motion"). Plaintiff opposes the Chin Motion.

By Notice of Motion (motion sequence no. 2), defendants, Kenneth Einhorn, PhD ("Einhorn") and Carmel Psychological Associates, P.C. ("CPA"), seek an Order: (a) pursuant to CPLR § 3212, granting summary judgment in their favor dismissing plaintiff's claims for lack of informed consent; (b) directing entry of judgment in their favor on said claims; and (c) granting such other and further relief as this Court deems just and proper ("Einhorn Motion"). Plaintiff opposes the Einhorn Motion.

The following papers were considered in determining the Motions:

PAPERS	NYSCEF DOC. NO.
The Chin Motion	
Notice of Motion Affirmation in Support Affidavit in Support Exhibits A-M Statement of Material Facts	25-41
Affirmation in Opposition	63-69

Exhibits A-D Response to Statement of Material Facts Memorandum of Law in Opposition	
Affirmation in Reply	75
The Einhorn Motion	
Notice of Motion Affirmation in Support Exhibits A-O Statement of Material Facts	42-59
Affirmation in Opposition, Exhibits A-D Response to Statement of Material Facts	70-73
Attorney Affirmation in Reply	76

Upon consideration of the foregoing documents, the Court determines the motions, which are consolidated herein for resolution, as follows:

As a preliminary matter, the Court observes that all the attorney affirmations submitted on these motions are not properly sworn because they fail to substantially comply with the required form language set forth in CPLR 2106 (*see Matter of Grandsard v Hutchison*, 227 AD3d 491 [1st Dept 2024]; *Matter of Sweet v Fonvil*, 227 AD3d 849 [2d Dept 2024]). Thus, the affirmations have been considered only to the extent that they attach documentary evidence and deposition testimony and raise legal arguments therein (*see Scanlon v Long Beach Public Schools*, 197 AD2d 567 [2d Dept 1993]).

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On or about May 15, 2023, plaintiff commenced this action by filing a summons and complaint against the defendants alleging claims of medical malpractice and lack of informed consent in connection with the care and treatment each rendered to plaintiff during the period of October 15, 2019 through September 15, 2020 as to Chin and CareMount and the period of April 16, 2017 through September 22, 2022 as to defendants Einhorn and CPA (*see* Romano Aff.[1] at ¶ 4 [NYSCEF Doc. No. 1]). Issue was joined by defendants' service of verified answers to the complaint on or about June 9, 2023 and June 23, 2023 (*Id.* [NYSCEF Doc. Nos. 4-6]).

In their answer, Chin and CareMount admit that CareMount owned, operated and staffed a multi-specialty medical practice located at 355 Kear Ave, Yorktown Heights, New York, plaintiff was a patient of said defendants, and they rendered certain medical and surgical care and

[1]Romano Aff. refers to the Affirmation in Support of Michael N. Romano, dated October 31, 2024 (NYSCEF Doc. No. 27).

treatment to plaintiff at certain separate and distinct periods of time (*see* Ex. B at ¶¶ 2-4). In their answer, Einhorn and CPA admit that Einhorn is licensed to practice psychology in New York State (*see* Ex. C).

On or about July 12, 2023, plaintiff served a bill of particulars in response to the demand of Chin and CareMount ("Chin BOP")(*see* Chin Ex. A [NYSCEF Doc. No. 29]). Plaintiff alleges said defendants were negligent in: deviating and departing from good and accepted standards of medical practice; failing to take a proper history; failing to assure that plaintiff lived as her preferred gender for a sufficient length of time before performing surgery; failing to assure that the plaintiff lived as her preferred gender for a sufficient time after hormone therapy before performing surgery; performing surgery before the plaintiff tried hormone therapy; improperly and incorrectly performing surgery; in failing to take into account the plaintiff's pre-existing psychological and cognitive conditions; performing a contraindicated surgery; failing to remove enough breast tissue and skin; failing to discuss plaintiff's ability to consent to the procedure with other physicians, including the co-defendants; failing to obtain appropriate letters of behavioral health clearance from a qualified provider; performing a procedure on a minor without proper informed consent; performing surgery without a diagnosis of gender dysphoria; failing to discuss transition process; failing to perform a mental health assessment prior to surgery; operating without coexisting mental health concerns being controlled; and utilizing an improper surgical technique (*Id.* at ¶ 1).

Plaintiff further alleges Chin and CareMount performed a breast removal surgery without obtaining the plaintiff's informed consent, failed to discuss the reasonable risk benefits and alternatives with the plaintiff or with the minor plaintiff's parent or natural guardian and failed to consider whether plaintiff was of sound judgment and/or cognitive ability to provide informed consent (*Id.* at ¶ 18).

On or about July 12, 2023, plaintiff also served a bill of particulars in response to the demand of Einhorn and CPA ("Einhorn BOP")(*see* Chin Ex. B [NYSCEF Doc. No. 30]).[2] Plaintiff alleges a lack of informed consent claim against Einhorn and CPA in that they failed to discuss the reasonable alternatives, risks and benefits of proceeding with surgery, Einhorn failed to discuss, among other reasonable options, further therapy, living in the selected gender for additional time, group therapy, peer support services, GnRH analogues and hormone therapy (*Id.* at ¶ 17).

[2]As the moving defendants only seek summary judgment dismissing the informed consent cause of action, the Court limited its consideration of the Einhorn BOP to the allegations regarding said claim.

ANALYSIS

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316). 'It is not the function of a court . . . to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)' (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 965 N.E.2d 240, 942 N.Y.S.2d 13). Moreover, summary judgment must be denied '[w]here different inferences may be drawn from facts that are undisputed' (*Sodexho Mgt., Inc. v Nassau Health Care Corp.*, 23 AD3d 370, 371, 805 N.Y.S.2d 551; *see Sadowski v Long Is. R.R. Co.*, 292 NY 448, 454-455, 55 N.E.2d 497; *Shea v Johnson*, 101 AD2d 1018, 1019, 476 N.Y.S.2d 706)" (*Mapfre Ins. Co. of N.Y. v Ferrall*, 214 AD3d 635,638 [2d Dept 2023]).

"A defendant seeking summary judgment in a medical malpractice action must make a prima facie showing either that he or she did not depart from the accepted standard of care or that any departure was not a proximate cause of the plaintiff's injuries (internal quotation marks and citations omitted). Once the defendant meets its prima facie burden, the plaintiff must demonstrate in opposition the existence of a triable issue of fact as to the elements with respect to which the defendant has met its initial burden (internal quotation marks and citations omitted)" (*Roy v Lent*, 219 AD3d 525, 525-526 [2d Dept 2023]). To establish proximate cause in a medical malpractice action, "a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant" (*Johnson v Jamaica Hospital Medical Center*, 21 AD3d 881, 883 [2d Dept 2005] quoting *Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852 [2d Dept 1998]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions (*see Lopresti v Alzoobaee*, 217 AD3d 759, 761, 191 N.Y.S.3d 171 [2023]; *Feinberg v Feit*, 23 AD3d 517, 519, 806 N.Y.S.2d 661 [2005])" (*Gardiola v Sung Chui Park*, 229 AD3d 602, 603 [2d Dept 2024]).

The Chin Motion

In support of the Chin Motion, defendants submitted *inter alia*, the expert affidavit of Joseph M. Serletti, M.D. (the "Serletti Aff."), CareMount medical records, office notes, operative report, post-operative report and surgery notes, copies of transcripts of the depositions of plaintiff, Einhorn, Chin, and non-party Claire Deacon ("Deacon"), court-related documents, statement of material facts and attorney affirmation.

In opposition to the Chin Motion, plaintiff submitted the affirmation of her attorney, the redacted affirmation of an expert physician licensed to practice in New York (Einhorn Ex. A), the redacted expert affidavit of a psychologist licensed to practice in California and Minnesota (Einhorn Ex. B),[3] response to statement of undisputed material facts, CPA records, World Professional Association for Transgender Health ("WPATH") standards of care and memorandum of law.

In reply, Chin and CareMount submitted an attorney affirmation.

The Testimony and Records

During her deposition, plaintiff testified she changed her name to Fox Grayson Varian from her birth name, Isabella Grace Basile, shortly after she turned 18 years old in 2021 and presently identifies as female (*see* Ex. C at 8-9, 23). At age 14, she was diagnosed with autism at CPA (*Id.* at 24, 52). She had previously been diagnosed with ADHD and anxiety (*Id.* at 25). In June 2017, at age 14, she began treating with Einhorn (*Id.* at 27, 49, 53). Although Einhorn recommended she have hormone therapy, she did not want it as she believed the risks of the treatment outweighed the benefits (*Id.* at 34-36, 103). In October 2018, she began using the name Gabriel partly because it was more masculine; in January 2019 she changed her pronouns to they/he. She discussed the name change with Einhorn (*Id.* at 82-83, 93-94). In or around December 2018, she began using a binder for her breasts, which she wore until shortly before the top surgery (*Id.* at 85-88). She also cut her hair very short and started dressing more masculine (*Id.* at 94-96). She stated she discussed transitioning with Einhorn in or about November 2018 (*Id.* at 96-98, 102). In January 2019, she changed her name to Rowan to sound more masculine and was identifying as in between or nonbinary and using the pronouns they/them (*Id.* at 99-101). Thereafter, she discussed having surgery with Einhorn as she did not want breasts; these feelings continued to intensify to the point that she felt suicidal if she did not have the surgery (*Id.* at 103-107). She made similar statements to her mother (*Id.* at 107-109). Initially, her mother wanted her to wait for the surgery, but she eventually agreed to it (*Id.* at 109-111).

Plaintiff stated she requested a surgeon recommendation from Einhorn in late September 2019. He recommended Chin and provided a letter recommending the surgery (*see* Ex. C at 114, 124, 189-190). Thereafter, she conducted her own research on Chin (*Id.* at 124). She made an appointment with him in mid-October which she attended with her mother (*Id.* at 124-125). She saw him 2 or 3 times with her mother to discuss the surgery. Chin recommended the lollipop method versus double incision. She did not like the lollipop method due to the potential scars and skin

[3]Plaintiff submitted the unredacted expert affidavits to the Court for its *in camera* review.

remaining after the surgery because she did not want to need a revision. However, she ultimately agreed to using the lollipop method for the top surgery (*Id.* at 126, 128, 132, 181, 184, 187). Following the surgery, she indicated her skin folded over on itself and was very painful (*Id.*). She was aware she would be placed under general anesthesia and there was a risk that she might not wake from the same (*Id.* at 129). Chin also told her there was a risk that the nipple could die, be necrotic and fall off, temporary drains would be inserted and tight bandages would be applied (*Id.* at 182, 187-188). The ambulatory surgery was performed on December 16, 2019; her mother signed the consent forms as she was a minor (*Id.* at 130-136). She had post-surgical visits with Chin. He told her the surgery went well; she did not recall making complaints to him during those visits (*Id.* at 137-138, 193-194).

In January 2021, she underwent revision surgery performed by Dr. Chandler as the deep tissue was uneven, the right side was concave and had loose skin and was painful and numb (*Id.* at 145-146, 151). She did not have any complaints after the revision (*Id.* at 152). She continued to identify as they/them in 2020 (*Id.* at 147-148). In the Summer of 2022, she stopped identifying as they/them and referred to herself as she/her (*Id.* at 148-150). She regretted the surgery (*Id.* at 169).

During his deposition, Einhorn testified that he has been a licensed psychologist in New York since 2003, has a PhD in clinical psychology and is trained in adolescent developmental psychology (*see* Ex. D at 11-12). He did not have any specific training in the health of transsexual, transgender and/or gender nonconforming persons (*Id.* at 14). However, he indicated he has a connection with the Gay Center in New York City and has spoken to them about transgender issues such as proper pronouns and available support services (*Id.* at 15). Plaintiff was the third gender nonconforming patient he was treating (*Id.* at 17). He may have treated more than ten but less than 20 other gender nonconforming patients (*Id.* at 18). One of these prior patients underwent top surgery (*Id.* at 20). He encouraged plaintiff to go to the Gay Center to discuss transgender issues and top surgery; she went to a similar program in Albany twice (*Id.* at 24-25, 85). He was aware that plaintiff and her mother went to a second similar program (*Id.* at 85). He is familiar with WPATH standards of care for the health of transsexual, transgender and gender nonconforming individuals and was familiar with them in 2018 but does not regard them as authoritative (*Id.* at 26).

Prior to treatment commencing, Einhorn indicated plaintiff had been diagnosed with anxiety, depression and being on the autism spectrum; however, he stated she did not consistently present as someone on the spectrum (*see* Ex. D at 34-35). Testing also showed plaintiff was of low intellectual and low executive functioning (*Id.* at 35). He believed the testing underestimated plaintiff's talent (*Id.* at 38). Before top surgery, he indicated plaintiff expressed on numerous occasions that she wanted to kill herself but she never had a plan (*Id.* at 40-41, 44-45, 76). His notes do not indicate plaintiff was suicidal, and he did not consider plaintiff to be suicidal before the top surgery (*Id.* at 45-46). He denied ever telling Deacon that plaintiff was a risk for committing

suicide if she did not have the top surgery (*Id.* at 46). During treatment in 2017, no issues arose regarding plaintiff's gender; he was treating her for depression and anxiety and difficulties in school and with her parents (*Id.* at 48-49).

Einhorn stated plaintiff began sharing that she wanted to be called Gabriel on or about November 24, 2018 (*see* Ex. D at 30-31, 50-52). Gender and identity became a big part of their conversations (*Id.* at 53, 56). He understood gender dysphoria to refer to a marked inconsistency between how somebody experiences themselves versus how they look in terms of their gender as well as how other people experience them (*Id.* at 55). In December 2018, they started talking about a binder and pronouns; plaintiff was identifying as male (*Id.* at 56-59, 67). Plaintiff was very frustrated about looking in the mirror and seeing breasts (*Id.* at 57). He started thinking of plaintiff as gender dysphoric in or about January 2019 but did not formally use that diagnosis in any paperwork (*Id.* at 60-61, 64, 70). The diagnosis of body dysmorphia was used for insurance billing purposes (*Id.* at 103). In February 2019, plaintiff was presenting as less anxious and depressed, was wearing a binder and using male pronouns (*Id.* at 68).

In March 2019, Einhorn stated plaintiff began to discuss top surgery and difficulty wearing the binder resulting in trouble breathing (*see* Ex. D at 70). On March 16, 2019, he met with plaintiff and her mother and they discussed top surgery (*Id.* at 72-73). As of this date, it was his opinion that plaintiff was experiencing gender dysphoria (*Id.* at 78-79). In April 2019, it is noted that plaintiff's mother was not in support of top surgery (*Id.* at 80, 104-105). Einhorn said he discussed with plaintiff and Deacon that the surgery was permanent and indicated plaintiff had done a lot of research on it (*Id.* at 90). Plaintiff was very logical about the surgery and very involved and interested in the process (*Id.* at 91, 94). In his notes between July 2019 and the date of the surgery, he wrote that plaintiff's judgment was mildly impaired (*Id.* at 93-96). He did not refer plaintiff to a practitioner with more experience in treating individuals with gender dysphoria because plaintiff had trouble developing trust with others (*Id.* at 99-100). As of July 2019, plaintiff was expressing a desire to get top surgery as soon as possible (*Id.* at 105). By the time they met with the surgeon, it was his understanding that plaintiff's mother had agreed to plaintiff getting the surgery (*Id.* at 106).

When he gave plaintiff Chin's name, he assumed she would get transgender medical support from that office as Einhorn was not a member of a transgender team (*see* Ex. D at 87-88). Chin had performed top surgery for some other patients (*Id.* at 89). He never discussed plaintiff with Chin (*Id.* at 89-90). Plaintiff discussed his visit with Chin with Einhorn and indicated they were waiting for insurance to approve the surgery (*Id.* at 116). He denied ever recommending the top surgery (*Id.* at 122). He did not believe the surgery was indicated, i.e. medically necessary, as it is elective and permanent (*Id.* at 116, 126). He did not recall if he told either plaintiff or Deacon the surgery was not indicated (*Id.* at 123). However, he did write a letter in support of

the surgery as plaintiff wanted it very badly (*Id.* at 124, 127-128, 130, 139, 142). He wrote body dysmorphia as that was the insurance diagnosis at the time but they were really talking about gender dysphoria (*Id.* at 136-138). In the letter, he did not include his opinion the surgery was not indicated or that he had reservations regarding the same (*Id.* at 140-141). He discussed hormone therapy with plaintiff, who indicated she did not want to try it (*Id.* at 146-147). He did not know what GNRH analogs are but did hear of insertions to suppress estrogen or testosterone production. Plaintiff had reached puberty before Einhorn began treating her (*Id.* at 150). He was aware that some adolescent patients regret having top surgery, but he did not discuss the possibility plaintiff might regret having the surgery (*Id.* at 150, 153). In his opinion, plaintiff was competent to consent to top surgery (*Id.* at 156-157).

During his deposition Chin testified that he is licensed to practice medicine in New York and is board certified in plastic surgery (see Ex. E at 14). Before he performs transmasculine top or breast removal surgery, he requires that a patient have a gender dysphoria diagnosis from a mental health professional (*Id.* at 24, 27). Here, according to Einhorn's October 14, 2019 letter of support indicating that since November of 2018 plaintiff felt she was transgender and felt much more comfortable being identified as male and Chin operated in December 2019, plaintiff had been feeling transgender for approximately 13 months before the surgery (*Id.* at 34; *see also* Ex. H; Ex. I). During Chin's first meeting with the then 16-year-old plaintiff to discuss surgery for gender reassignment, plaintiff told Chin he started thinking about transitioning for three or four years and had the support of his parents (*Id.* at 34, 47). Chin's office note from the October 15, 2019 visit reads "he would like to perform mastectomies and undergo gender reassignment in order to align himself sexually" (*see* Ex. I). He also discussed the surgical options and explained the risks and benefits with plaintiff at that time (*Id.*). Plaintiff also told Chin he had been binding for at least one year (*see* Ex. E at 37). As plaintiff was a minor, it was necessary to have parental support for the surgery and the consent forms for the operation were signed by a parent (*Id.* at 44, 67). At this visit, Chin believed plaintiff was gender dysphoric (*Id.* at 75-76, 127-128 138). He also believed Einhorn thought plaintiff had gender dysphoria (*Id.* at 77-78, 82-83, 130).

Chin had a second pre-operative visit with plaintiff and his mother on November 4, 2019 to review treatment options for gender reassignment surgery, the risks and benefits and to confirm plaintiff and her mother wanted the surgery after having time to assess the information provided during the first visit(*see* Ex. E at 64, 69, 74-75, 132-133; *see also* Ex. J). He performed the surgery, which in his opinion was indicated, on December 16, 2019 (Ex. E at 104, 129). Chin testified consent forms were signed on the date of the surgery but were misdated; he would not have been allowed into the operating room if the consent forms had not been signed (*Id.* at 111-112). On the date of surgery before the surgery, Chin discussed the risks and benefits of surgery with plaintiff (*Id.*).

Per Chin's notes, during the post-operative visits, plaintiff was doing well (*Id.* at 116-118). During the third post-operative visit, the notes indicated plaintiff had questions regarding a widening of the vertical scar and redness in that area and they discussed ways to improve the scarring (*Id.* at 118-119). In February, she returned due to a dissolvable suture abscess that was treated (*Id.*). During the June 30, 2020 visit with plaintiff and her mother, plaintiff reported being happy but had a little bit of excess tissue on the left lower breast and on the right side the nipple was a little lower in position and noted the scarring (*Id.* at 120-121). The possibility of revision surgery was also discussed (*Id.* at 122). During the last visit on September 15, 2020, plaintiff was concerned about the right super areola area where the skin had not tightened completely (*Id.* at 123-125; *see also* Ex. G).

During her deposition, Deacon testified she is plaintiff's mother and is a licensed practical nurse (*see* Ex. F at 6-7). Her daughter had learning disabilities and social/emotional issues which impacted her education (*Id.* at 45). She indicated it was possible she spoke with her daughter's therapist, Christy Gotto ("Gotto"), about gender issues and recalled her daughter telling Gotto she might be gender fluid (*Id.* at 34, 41-42). When she was seeing Gotto, Deacon was aware plaintiff was experiencing an eating disorder (*Id.*). She first became aware plaintiff was dissatisfied with her gender when she was 15 years old (*Id.* at 35). When she was 12 or 13 years old, plaintiff told her she was gay (*Id.* at 37). Plaintiff started to develop breasts at 11 or 12 years old, and she had a strong reaction to going through puberty (*Id.* at 38-39, 58). When plaintiff was treating with Einhorn, Deacon began to hear that plaintiff was nonbinary and wanted to bind her breasts and dress like a boy (*Id.* at 40).

Deacon discussed plaintiff's gender transition with Einhorn, who told her approximately 94% of the people who identify as trans do not waver from the same (*see* Ex. F at 65, 109, 120). She testified that Einhorn was "steadfast in explaining to me why it was absolutely necessary not just for her happiness but for him to not commit suicide" (*Id.*). Although initially against the surgery, she signed the consent form for plaintiff to have the top surgery (*Id.* at 65-66, 114-115). Prior to consenting to the surgery, she was concerned plaintiff may commit suicide if she did not have the top surgery, which plaintiff had told her she would do more than once (*Id.* at 68-70, 115, 143).

She confirmed plaintiff began seeing Einhorn when she was 14 years old (*see* Ex. F at 73, 80). Prior to starting treatment with Einhorn, plaintiff underwent a series of psychological testing at CPA, which resulted in the opinion that she was on the autism spectrum (*Id.* at 73-74). During plaintiff's first year of treatment with Einhorn, she changed her name to Gabriel and then Rowan, began to bind her breasts and changed her pronouns (*Id.* at 83-86, 95-96). At some point in 2018, Deacon stated plaintiff cut her hair very short and began dressing more like a boy (*Id.* at 96). Deacon ordered the binder for plaintiff, who wore it or tight sports bras for approximately one year or a little longer before the surgery (*Id.* at 98). She was supportive of plaintiff and purchased

the sports bras and binder for plaintiff because plaintiff was "saying I am not comfortable in this body," she wanted to be a boy, wanted a flat chest, wanted top surgery and was trans (*Id.* at 100, 103-105, 116, 124, 147-149). She discussed plaintiff's possible top surgery with Einhorn multiple times (*Id.* at 108-114, 120).

Deacon went with plaintiff to her first visit with Chin (*see* Ex. F at 149-150). She recalled signing a consent form, Chin asking plaintiff if she was sure she wanted top surgery and plaintiff saying yes (*Id.* at 150). Deacon did not express her reservations about the surgery to Chin (*Id.* at 153). She signed the consent forms permitting plaintiff's top surgery (*Id.* at 195-197).

Expert Affidavit

According to his affidavit, Serletti is duly licensed to practice medicine in the states of New Jersey and Pennsylvania, is board certified in plastic surgery and during the past four years has performed over 100 gender reassignment double mastectomies, known as "top surgeries" on patients born female who identified as male (*see* Serletti Aff. at ¶¶ 1-3). Thus, he is familiar with the role of the psychologist, which is to clear the patient for surgery, and the role of the plastic surgeon, which is to obtain informed consent for the surgery and perform the surgery. Here, he states Einhorn cleared plaintiff for top surgery by providing Chin with a letter of support that plaintiff met the psychological requirements for top surgery. He further states it was in accordance with the standard of care for Chin, as the plastic surgeon, to defer to the psychologist on this issue (*Id.* at ¶¶ 3, 37).

Based upon his review of the plaintiff's medical records, including those of Chin, CareMount, Einhorn, Northern Westchester Hospital and Dr. Chandler, the bill of particulars, all relevant deposition testimony and his expertise in plastic surgery and the performance of top surgeries, it is his opinion, to a reasonable degree of medical certainty, that Chin did not deviate from plastic surgical standards of care in treating the plaintiff and that the treatment provided by Chin to plaintiff did not proximately cause the damages alleged in this action (*see* Serletti Aff. at ¶ 4). Specifically, he states that Einhorn testified during his deposition that he believed plaintiff had gender dysphoria and listed the diagnosis as body dysmorphia for insurance/billing purposes so it was reasonable for Chin to believe plaintiff had gender dysphoria (*Id.* at ¶ 7), that the body of Einhorn's support letter describing plaintiff's symptoms was consistent with gender dysmorphia (*Id.*), the testimony of plaintiff and that of her mother were consistent with Chin's office note indicating plaintiff had wanted top surgery for 3 to 4 years before the initial visit with Chin and that plaintiff had been transgender and identifying as a boy for at least one year before the surgery was performed (*Id.* at ¶ 8), that plaintiff threatened to kill herself if her mother did not consent to the top surgery (*Id.*) and that plaintiff

admits she was happy with the surgery and did not begin to de-transition for approximately three years after the surgery (*Id.* at ¶ 32). Accordingly, it is Serletti's opinion that plaintiff's claim the top surgery was contraindicated is without merit as a licensed psychologist cleared plaintiff for the surgery and the substance of the letter provided by Einhorn clearly described a patient with gender dysphoria notwithstanding the diagnosis of body dysmorphia listed therein (*Id.* at ¶ 35). Moreover, Serletti notes Chin exceeded the standard of care by corroborating that plaintiff did indeed have gender dysphoria during his pre-operative visits (*Id.* at ¶ 38).

It is also Serletti's opinion that hormone therapy is not a prerequisite or a contraindication for top surgery. He notes that Chin testified only 20% of patients who have top surgery undergo hormone therapy, and Serletti routinely offers top surgery to an adolescent who is not taking hormone replacement. He avers forcing a patient to undergo hormone therapy before top surgery is not the standard of care (*see* Serletti Aff. at ¶ 43).

It is Serletti's further opinion that Chin's technical performance of top surgery – a bilateral short scar breast reduction known as a lollipop breast reduction - was within the standard of care in that he removed the appropriate amount of breast tissue and skin. Serletti noted this technique reduces the amount of scarring compared to traditional breast reduction and is also nipple-sparing (Serletti Aff. at ¶¶ 9, 23). He avows this is a recognized surgical technique and is used to reduce scarring and also preserve the nipple by leaving enough skin and breast tissue behind to ensure a proper blood supply to the nipples so they do not necrose. Further, he indicates Chin informed both plaintiff and his mother during the two pre-operative visits that additional surgery may be required as well as the possibility of a second procedure for "further skin excision" (*Id.* at ¶ 44).

Here, Chin and CareMount met their burden of proof establishing they did not deviate from the standard of care in performing the top surgery on the plaintiff and obtained informed consent through Serletti's affidavit. In the same, Serletti details Chin was in possession of Einhorn's, plaintiff's treating psychologist's, letter of support for the top surgery, the body of the letter described a patient with gender dysphoria, Einhorn testified that in his opinion plaintiff had gender dysphoria commencing in or about January 2019, plaintiff was identifying as male as of November 2018, Einhorn indicated plaintiff was competent to consent to the surgery, did not want to undergo hormone therapy, although it was discussed, was aware the surgery was permanent and very much wanted the surgery, which is why Einhorn wrote the letter of support. Serletti also avers that hormone therapy is not a prerequisite to performing top surgery and Chin provided informed consent to plaintiff and her mother regarding the medical aspects of the surgery.

As Chin and CareMount made a prima facie showing of their entitlement to summary judgment on both causes of action, the burden shifted to plaintiff to demonstrate the existence of triable issues of fact regarding the same (*see Gardiola v Park,* 229 AD3d 602 [2d Dept 2024]; *Mann v Okere*, 195 AD3d 910 [2d Dept 2021]). In opposition, plaintiff submitted the redacted affidavits of a plastic surgeon ("Surgeon") and a psychologist ("Psychologist").

In the Surgeon's affidavit ("Surgeon Aff."), the Surgeon states they are familiar with the role of plastic surgeons in the performance of top surgeries, the standard of care applicable to treatment of such patients, the standard of care regarding the interactions between the plastic surgeon and mental health professional treating the patient in connection with such surgeries, and the standard of care for obtaining informed consent to gender reassignment surgery, including the collaboration between the plastic surgeon and mental health provider (*see* Surgeon Aff. at ¶ 2). The Surgeon opined that it was a departure from the standard of care for Chin to perform gender reassignment surgery on plaintiff when she presented with a diagnosis of body dysmorphia, which is not an indication for surgery. It is his further opinion that even if the adolescent plaintiff had gender dysphoria performance of the surgery was a departure from the standard of care because: there was not a compelling reason for gender reassignment surgery; plaintiff had not attempted several reversible and partially reversible interventions, which is a prerequisite to surgery; plaintiff had not lived in the desired gender publicly for a sufficient period of time, i.e. at least one year, prior to surgery; the Einhorn letter of support was inadequate, and there was a lack of adequate communication with the patient's mental health team and plaintiff's parents (*Id.* at ¶ 3).

Specifically, the Surgeon expert states that the WPATH Standards of Care for the Health of Transsexual, Transgender and Gender Non-Conforming People" sets forth the standard of care for treatment of transgender people, including adolescents, and are widely relied upon by psychologists and plastic surgeons contemplating gender reassignment surgery for a patient with gender dysphoria. The expert asserts that these standards provide that before an adolescent becomes "a candidate for gender reassignment surgery, the patient should explore fully reversible interventions (i.e. use of GnRH analogs to suppress puberty) and partially reversible interventions (such as hormone therapy) . . . and the adolescent patient should also be living publicly as the desired gender for an extensive period of time, usually a year" (*see* Surgeon Aff at ¶ 15). Here, however, the expert notes plaintiff did not use GnRH analogs or hormones and did not identify fully and publicly as male for at least one year and therefore she should not have been a candidate for irreversible gender reassignment surgery (*Id.*). Accordingly, it is the expert's opinion that Chin departed from the standard of care in his treatment of plaintiff and in performing the surgery that was neither indicated nor appropriate (*Id.* at ¶ 31).

The expert further opines that the Einhorn letter of support for the top surgery was inadequate in that there is no discussion of the parents' opinion or reference to discussion between them and Einhorn about the procedure, Einhorn noted diagnoses of autism spectrum disorder, social phobia and body dysmorphic disorder, which are red flags to a plastic surgeon considering possible performance of gender reassignment surgery and there is no diagnosis of gender dysphoria in the letter (*see* Surgeon Aff. at ¶ 22). It is the expert's opinion that Chin departed from the standard of care when he failed to speak to Einhorn about the plaintiff's diagnosis and the prerequisites to surgery outlined above, failed to confirm there was a complete psychiatric work up and proceeded with gender reassignment surgery without a diagnosis of gender dysphoria (*Id.* at ¶¶ 33-37). He also opines that it was a deviation from the standard of care for Chin to perform his own assessment of plaintiff to ensure she had gender dysphoria since he was a plastic surgeon, not a mental health professional, and to defer to Einhorn who never made a diagnosis of gender dysphoria, a necessary diagnosis for surgery (*Id.* at ¶¶ 44-48).

The expert also opines that Chin deviated from the standard of care in performing the surgery in that he failed to remove adequate skin and tissue making revision surgery unavoidable (Surgeon Aff. at ¶ 52).

It is the Surgeon's further opinion that Chin failed to ensure that the plaintiff was informed of the risks, benefits and alternatives to surgical intervention and failed to have extensive conversations with plaintiff, her mother and Einhorn regarding the possibility that surgery would not alleviate her symptoms of gender dysphoria or that it could lead to regret later if the gender dysphoria did not continue into adulthood (*see* Surgeon Aff. at ¶ 3). The Surgeon notes the informed consent discussion by Chin did not include the risks or alternatives regarding treatment of her gender dysphoria and Einhorn was not involved with the discussion to explain the same (*Id.* at ¶¶ 25, 29).

The Psychologist, who maintains a private practice focused on providing gender affirming mental healthcare, especially for trans-youth and their families, is familiar with the standard of care and requirements for a psychologist in providing services to an individual contemplating gender affirming surgery, and the standard of care for assessing a patient for the same in connection with providing a letter of support for gender affirming surgery (*see* Psychologist Aff. at ¶ 2). It is their opinion that both defendants were responsible for obtaining informed consent from the minor patient and her parent and that "each defendant was responsible for explaining the risks within their area of practice; as for Einhorn, he was responsible for explaining the psychological risks, benefits and alternatives to gender reassignment surgery" (*Id.* at ¶¶ 4-5). They state "the mental health professional cannot determine if the patient is medically suited for the

surgery, and the surgeon cannot determine if the patient is psychologically qualified for the surgery" so they must consult with each other and "each must obtain informed consent to treatment in their respective areas of practice" (*Id.* at ¶ 45).

Said expert affidavits raise triable issues of fact as to whether Chin and CareMount deviated from the standard of care in performing gender reassignment surgery on plaintiff that allegedly was not indicted or appropriate; in performing gender reassignment surgery on an adolescent based upon a letter of support that stated plaintiff had a diagnosis of body dysmorphia and not gender dysphoria;[4] in failing to contact Einhorn to discuss the discrepancy between the diagnosis made in the letter of support of body dysmorphia and the referral for gender reassignment surgery;[5] in performing gender reassignment surgery based upon a letter of support that lacked any reference to parental consent therein and any indication as to whether the patient had attempted reversible and/or partially reversible alternatives before seeking surgery without first consulting with plaintiff's treating psychologist; failing to collaborate and consult with Einhorn before performing the surgery;[6] and whether the surgery was properly performed regarding the removal of skin and breast tissue. Moreover, where, as here, there are conflicting medical expert opinions, summary judgment is not appropriate (see *Gardiola v Park*, 229 AD3d at 603; *Starre v Dean*, 229 AD3d 728 [2d Dept 2024]).

"[L]ack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence" (*Friedberg v Rodeo*, 193 AD3d 825 [2d Dept 2021 [internal citations and quotation marks omitted]). "A cause of action predicated on a lack of informed consent is meant to redress a failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical ... practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation" (*Dyckes v Stabile*, 153 AD3d 783, 784 [2d Dept 2017 [internal

[4]Per the WPATH Standards of Care, the recommended content of the referral letter for surgery is: "1. The client's general identifying characteristics; 2. Results of the client's psychosocial assessment, including any diagnoses; 3. The duration of the mental health professionals' relationship with the client, including the type of evaluation and therapy or counseling to date; 4. An explanation that the criteria for surgery have been met, and a brief description of the clinical rationale for supporting the patient's request for surgery; 5. A statement about the fact that informed consent has been obtained from the patient; 6. A statement that the mental health professional is available for coordination of care and welcomes a phone call to establish this" (see Ex. D, WPATH, The Standards of Care, at 27-28).

[5]Per the WPATH Standards of Care, "a criterion for all breast/chest . . . surgeries is documentation of persistent gender dysphoria by a qualified mental health professional" (*Id.* at 58).

[6]Per the WPATH Standards of Care, "[s]urgeons must talk at length with their patients and have close working relationships with other health professionals who have been actively involved in their clinical care . . . a surgeon must be confident that the referring mental health professional(s) . . . are competent in the assessment and treatment of gender dysphoria because the surgeon is relying heavily on their expertise" (*Id.* at 56).

citations and quotation marks omitted]). To recover damages for malpractice based upon lack of informed consent, a plaintiff is required to show "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" (*Figueroa-Burgos v. Bieniewicz*, 135 AD3d 810, 811 [2d Dept 2016]), quoting *Spano v Bertocci*, 299 AD2d 335 [2d Dept 2002]). "The third element is construed to mean that the actual procedure performed for which there was no informed consent must have been a proximate cause of the injury" (*Id.* at 811-812).

Here, Chin and CareMount met their burden of proof through expert testimony that they obtained informed consent from plaintiff and her mother regarding the risks and benefits of the top surgery. In opposition, however, through her experts, plaintiff raised a triable issue of fact as to whether the moving defendants obtained plaintiff's informed consent in that Chin did not involve Einhorn in the informed consent discussions with plaintiff and her mother regarding the surgical procedure, which was to address a psychological diagnosis, failed to discuss alternatives to the surgery and failed to advise or discuss whether the surgery was appropriate when the diagnosis provided was body dysmorphia, which is not treated surgically, and not gender dysphoria, which can be treated surgically.

The Einhorn Motion

In support of the Einhorn Motion, defendants submitted *inter alia*, the CareMount medical records, CPA records, surgical consent forms, copies of transcripts of the depositions of plaintiff, Einhorn, Chin, and non-party Deacon, court-related documents, statement of material facts and attorney affirmation.

In opposition to the Einhorn Motion, plaintiff submitted the affirmation of her attorney, the redacted expert affidavit of a psychologist licensed to practice in California and Minnesota (Einhorn Ex. A), the redacted affirmation of an expert plastic surgeon licensed to practice in New York (Einhorn Ex. B), response to statement of undisputed material facts, CPA records, and WPATH standards of care.

In reply, Einhorn and CPA submitted an attorney affirmation.

Einhorn and CPA contend they are entitled to dismissal of the lack of informed consent cause of action asserted by plaintiff against them because Einhorn did not perform the top surgery and hence did not owe any duty to provide informed consent to plaintiff regarding the risks,

benefits or alternatives of the surgery as a matter of law (*see* Mancini Aff. at ¶¶ 6, 18).[7] Said defendants assert it is undisputed that Chin performed the surgery, Einhorn did not assist with the surgery, Einhorn is not a physician and Einhorn was not present during Chin's two pre-operative visits with plaintiff and her mother during which he discussed the surgical procedure (*Id.* at ¶¶ 25-28, 30). They also contend Einhorn did not order or recommend the surgery (*Id.* at ¶ 30). They cite *Spinosa v Weinstein*, 168 AD2d 32 (2d Dept 1991), as demonstrating that New York Courts have been reluctant to extend liability under a theory of lack of informed consent to medical providers who had limited involvement in the said surgical procedure (*see* Mancinci Aff. at ¶ 30). In *Spinosa*, the Second Department affirmed the grant of an assistant surgeon's motion for summary judgment finding he had no duty to provide informed consent to the plaintiff due to his limited involvement in plaintiff's care in that he did not order or perform the surgeries at issue (*Id.* at 40-41).

Defendants further assert that even if Einhorn had a duty to provide informed consent for the top surgery the same was provided by Chin, which relieved Einhorn of any potential liability for a failure to provide it (*see* Mancini Aff. at ¶¶ 34-36). Lastly, as Einhorn did not have a duty to provide informed consent to plaintiff regarding the top surgery, CPA argues it also cannot be held liable for the same since it has been sued only for vicarious liability premised upon Einhorn's alleged acts (*Id.* at ¶¶ 37-38).

In opposition, plaintiff contends that her expert affidavits establish this surgery is intended to treat a psychological diagnosis and thus both the surgeon and the psychologist should have engaged in consent discussions with plaintiff, which Einhorn failed to do (*see* Varisco Aff.[8] at ¶ 5; Ex. A at ¶ 45). Said expert further opines Einhorn failed to inform plaintiff and her mother of viable alternatives to surgery, that the surgery may not alleviate her psychological symptoms and her gender issues may not continue into adulthood resulting in remorse after the permanent alteration of her anatomy (*Id.*). Further, plaintiff contends her expert opines Einhorn inserted himself into the consent process by telling Deacon that plaintiff would commit surgery if she did not consent to the surgery when he did not believe plaintiff was ever suicidal (*Id.*).

Plaintiffs contend defendants misinterpret the holding of *Spinosa v. Weinstein*, and point to facts which are distinguishable from those herein. Plaintiff asserts the Court in *Spinosa* held that either the prescribing physician or the treating physician is obligated to obtain the patient's informed consent (*Id.* at 40). Also, plaintiff notes *Spinosa* involved a podiatric malpractice action where the question before the Court was whether a surgical assistant was required to obtain

[7]Mancini Aff. refers to the Affirmation of Daniel Mancini, Esq., dated November 1, 2024, in Support of the Einhorn Motion (NYSCEF Doc. No. 44).
[8]Varisco Aff. refers to the Attorney Affirmation in Opposition of Nicole M. Varisco, dated January 22, 2024 (NYSCEF Doc. No. 70).

informed consent as well as the surgeon, which the Court answered in the negative. The court did not address whether a psychologist referring a patient for gender reassignment surgery can rely on a plastic surgeon to disclose the psychological risks of the procedure (*see* Varisco Aff. at ¶¶ 30-31). Moreover, plaintiff argues it is undisputed that Einhorn prescribed the top surgery for plaintiff, sent her to Chin and provided a letter of support, thus under the cited cases plaintiff claims the motion must be denied (*Id.*). Plaintiff also contends issues of fact exist as to whether Einhorn failed to inform plaintiff of the risks, benefits and alternatives to top surgery (*Id.* at Point II). Lastly, as the claim against Einhorn should not be dismissed, plaintiffs contend the vicarious liability claim against CPA cannot be dismissed (Id. at ¶ 32).

Here, defendants met there prima facie burden entitling Einhorn and CPA to summary judgment on the lack of informed consent claim in that it is undisputed that Einhorn did not and could not perform the medical procedure as he is not a physician and therefore did not owe any duty to plaintiff to obtain her informed consent for the surgery (*see S.W. v Catskill Regional Medical Center*, 211 AD3d 890 [2d Dept 2022]; *Macancela v Wyckoff Heights Medical Center*, 176 AD3d 795 [2d Dept 2019]; *Mattocks v Ellant*, 231 AD3d 813 [2d Dept 2024]). However, in opposition, plaintiff raised an issue of fact as to whether Einhorn failed to advise plaintiff of the risks, benefits and alternatives to gender reassignment surgery. In *Laskowtiz v CIBA Vision Corp.,* 215 AD2d 25 (2d Dept 1995), the Court held that health care professionals, such as psychologists, not named in Public Health Law § 2805-d "remain bound by their traditional, common-law duty to obtain a patient's informed consent" (*Id.* at 849). Further, a question of fact exists that given the uniqueness of gender reassignment surgery, i.e. a surgical procedure to treat a psychological condition, and Einhorn's issuance of a letter in support of the medical procedure that would be relied upon by the surgeon, which invited the surgeon to contact him and which was a prerequisite for performance of top surgery, as to whether Einhorn was merely a referring psychologist or involved in the diagnosis and treatment of the plaintiff requiring him to obtain informed consent for the top surgery, especially the psychological risks, in addition to Chin (*see Reyz v Khelemsky*, 44 AD3d 640 [2d Dept 2007]*; Nisenholtz v Mt. Sinai Hospital*, 126 Misc.2d 658 [NY Sup. Ct. 1984]).

All other arguments raised on this motion and evidence submitted by the parties in connection therewith have been considered by this Court, notwithstanding the specific absence of reference thereto.

Accordingly, it is hereby

ORDERED that defendants, Simon H. Chin, M.D. and CareMount Medical, P.C.'s, motion for summary judgment pursuant to CPLR 3212 is DENIED; and it is further

ORDERED that defendants, Kenneth Einhorn, PhD and Carmel Psychological Associates, P.C.'s, motion for summary judgment pursuant to CPLR 3212 is DENIED; and it is further

ORDERED that the parties shall appear in **Courtroom 1602 for an in-person Settlement Conference on May 9, 2025 at 9:30 a.m.**

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
April 7, 2025

ENTER:

HON. NANCY QUINN KOBA, J.S.C.

To All Counsel Via NYSCEF